



IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF WALES
CHANCERY

Neutral Citation Number: [2020] EWHC 2681 (CH)

Re No: F30CF015

The Cardiff Civil Justice Centre
2 Park Street
Cardiff
CF10 1ET

Tuesday, 25 February 2020

Before:

MR JUSTICE MARCUS SMITH

B E T W E E N :

TBD (OWEN HOLLAND) LIMITED Claimant

- and -

ANDREW SIMONS & OTHERS
Defendants

MR A. BUTLER QC (instructed by Geldards LLP) appeared on behalf of the Claimant.

MR N. CADDICK QC (instructed by Simon Birn) appeared on behalf of the Defendants.

J U D G M E N T

MR JUSTICE MARCUS SMITH:

- 1 I have before me a difficult point as to whether, in circumstances where a court is minded to order a claimant to provide security for costs, as the price for that order, a defendant should be required to provide an undertaking in damages to hold the claimant harmless against the costs or loss caused by the order requiring the claimant to provide security.
- 2 I confess that I have never in my practice seen such an order made, whether in the Chancery Division or in the Commercial Court. However, Mr Butler, QC, who appears for the claimant, points out that the Commercial Court Guide indicates that such a provision, that is to say such an undertaking, can be included in appropriate cases. Hildyard J in the *RBS Rights Issue* litigation indicated at [150] that he saw no reason why a court should not make an order containing an undertaking such that where an order for security causes a party loss in circumstances where hindsight reveals that the order should not have been made, the claimant's losses should be in some way dealt with.
- 3 I certainly consider that the fact that this is an unusual order should not preclude my making it. The difficulties that I have with it is that it is extremely difficult both to define the contingency that triggers the undertaking and very difficult to identify or baseline the consequences that the defendant, obtaining the benefit of an order, may be exposed to.
- 4 If I can expand both of those points. Cross-undertakings are almost always the price of an interlocutory injunction. It is very easy to define the contingency that triggers the cross-undertaking, because what is the trigger is the clear finding at trial that an interlocutory injunction should not have been granted, that clear finding being manifest in the court's failure to grant a final injunction in terms similar to the interlocutory injunction. So, in terms of identifying the trigger that causes the undertaking to be activated, the party providing it knows exactly where it stands.
- 5 Equally, in terms of the consequences of the undertaking, the undertaking is focussed on essentially the harm that is caused by the interlocutory injunction to the party enjoined, and both parties will have a very clear idea as to what sort of damage or harm the interlocutory injunction will cause to the person enjoined. And so, the party obtaining the injunction will have some idea of what it may be called upon to pay.
- 6 Here, it is actually very difficult to baseline what the consequences of the undertaking might be. Let us take an extreme case. It may well be that the provision of security, contrary to the expectation in my judgment, tips the claimant into insolvency. Is that to be a matter against which the defendants must hold the claimant harmless? It seems to me that this is a very open-ended and dangerous jurisdiction that I am being invited to exercise.
- 7 The next point that I would make in relation to this jurisdiction is that it is actually very difficult to say – even after the event – that the provision of security was wrongly granted. The fact is that security is given in light of a known contingency that the defendant may obtain a costs order against the claimant, and the reason security is provided is in the event of that contingency to ensure that the costs order is not writ in water but actually is paid. That is something which is justifiable or capable of justification whatever happens at the trial of the case. The fact is that one knows that trials are uncertain things, one knows that costs orders may or may not be made in favour of the defendant. All one is saying in making the provision for security for costs is that if a costs order is made in favour of the defendant, it should have teeth.

- 8 That, as it seems to me, is the answer to this particular application. In my judgment, there is obviously jurisdiction to require a price for any order that the court is minded to make, and I see no difficulty in theory in this court extracting from a defendant an undertaking as the price for an order for security for costs. However, it seems to me that it must be clear at the time of the making of the order that there are some special circumstances that suggest that the party providing the security requires a degree of protection more than simply receiving back the security provided if the action goes the claimant's way. It seems to me that it is necessary to have such unusual circumstances, because if one has them one can then define rather more clearly than one can in the present case the contingency that will trigger the undertaking, and have a better idea as to what the consequences of the undertaking will be to the party providing it, if it is triggered.
- 9 In this case I am afraid I can see nothing out of the ordinary to justify the granting of an undertaking. What one has is the usual issue that the provision of security will have costs implications. That is so in every case where security is provided. It may be that the security is, when all is said and done, unnecessary because the action goes the claimant's way, and it receives a series of costs orders in its own favour, rather than being obliged to pay costs. That again is something which seems to me to be true of almost any case where security is ordered. And so, without in any way suggesting that the jurisdiction does not exist, it seems to me that this is not a case in which I should exercise it. And I therefore am not prepared to make an order for security for costs contingent upon the provision of an undertaking in damages by the defendants.
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CERTIFICATE

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